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No. 01-455

In The

Supreme Court of the United States

FRANCONIA ASSOCIATES et al.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

DUANE DESIDERIO
*THOMAS JON WARD
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

*COUNSEL OF RECORD

19 pp

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

THE PROPERTY OWNERS IN THE CASE AT BENCH SHOULD NOT BE TIME-BARRED FROM BRINGING A TAKINGS CLAIM, BECAUSE ANY SUCH CLAIM COULD NOT HAVE ACCRUED UNTIL THE GOVERNMENT APPLIED THE STATUTE TO THE PETITIONERS' PROPERTY ..4

A. Takings Cases Decided in the Real Property Context Apply Equally When Monetary Property is Taken 6

B. The Federal Circuit's Decision Below Cannot be Reconciled with *Palazzolo* or *Williamson County* 10

CONCLUSION.....14

TABLE OF AUTHORITIES

CASES **Page(s)**

Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997) 12

City of Annapolis v. Waterman, 745 A.2d 1000 (Md. App. 2000) 9

Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) .....*passim*

District Intown Properties Limited Properties, et al. v. District of Columbia, et al., 198 F.3d 874 (D.C. Cir. 1999) 9

Dolan v. City of Tigard, 512 U.S. 374 (1994) 7

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).....8

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 12

Forest Properties Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999).....12

Franconia Associates v. United States, 240 F.3d 1358 (Fed. Cir. 2001)..... 4-5

Good v. United States, 189 F.3d 1355 (Fed Cir. 1999)..12

Hadachek v. Sebastian, 239 U.S. 394 (1917) 7

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....6

Howard W. Heck and Assoc., Inc. v. United States, 134 F.3d 1468 (Fed. Cir. 1998).....12

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).....7

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 9, 12

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992).....7

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001)..... 10-12

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 7-8

Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 8

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997).....4

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).....6

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....7

Villas of Lake Jackson, Ltd. V. Leon County, 906 F.Supp 1509 (N.D. Fl 1995).....9

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)..... 12-13

STATUTES

28 U.S.C. § 2501 5

OTHER

Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1 (1997) 9

Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 Ariz. St. L.J. 423 (1995).....9

James E. Holloway, Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 Dick. J. Env. L. Pol. 421 (2001) 9

INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties written consent to file this brief as amicus curiae in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes.

Since its inception, NAHB has played an integral role in increasing affordable housing for low-income people. Many of its members construct multifamily buildings, including government-subsidized housing.

NAHB has been before the Court as amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional*

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[1] Pursuant to Rule 37.6 of this Court, amicus state that their counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Reservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, --- U.S. --- (oral argument held January 7, 2002).

SUMMARY OF ARGUMENT

This Court has made clear that a takings claim does not accrue until the government has denied compensation. Furthermore, this Court and lower courts have never made a distinction between monetary takings claims and real property takings claims. Thus, the Federal Circuit erred in holding that the petitioner's takings claim accrued when Congress enacted ELIHPA in 1988.

THE PROPERTY OWNERS IN THE CASE AT BENCH SHOULD NOT BE TIME-BARRED FROM BRINGING A TAKINGS CLAIM, BECAUSE ANY SUCH CLAIM COULD NOT HAVE ACCRUED UNTIL THE GOVERNMENT APPLIED THE STATUTE TO THE PETITIONERS' PROPERTY.

NAHB's brief addresses the second question presented:

> Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

The Federal Circuit answered that question affirmatively: all takings claims based on the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA") first accrued when that statute was passed in 1988. So, according to the Federal Circuit, the last time a takings claim could have been filed under ELIHPA was in 1994. *See Franconia Associates v. United States,* 240 F.3d 1358, 1365-66 (Fed. Cir. 2001). That was the wrong result.

The Federal Circuit itself recognized, "[a] clair against the United States first accrues when the government's liability is determined." *Franconia Associates,* 240 F.3d at 1363 (citing *Kinsey v. United States,* 852 F.2d 556, 557 (Fed. Cir. 1988)). As this Court has made clear, not all takings violate the Fifth Amendment. The constitutional infraction arises where the

taking goes uncompensated. See, e.g., *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 734 (1997) (stressing "Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment"). Accordingly, any takings claims the FmHA borrowers may bring, *as applied to them,* could not have accrued simply upon Congress's passage of ELIHPA. (The claimants do not posit their case as a facial challenge.) Rather, an as-applied ELIHPA taking would have accrued only when the government denied one of the claimant's requests to prepay his or her loan.[2] The six-year clock in 28 U.S.C. § 2501 would have started ticking from that point forward, and the Federal Circuit acted in error by ruling otherwise.

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[2] The FmHA can accept prepayment without making efforts to extend the low income use if certain conditions exist. 42 U.S.C. § 1472(c)(5)(G) (1988). Furthermore, the Federal Circuit recognized that there was a process whereby a borrower could prepay his or her loan:

> Subtitle C imposes restrictions on prepayments of section 515 mortgages that originated before December 21, 1979. One restriction, codified in 42 U.S.C. § 1472(c)(4)(A) (1988), requires that *before FmHA can accept a prepayment,* it must "make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed."

Franconia Associates, 240 F.3d 1361 (emphasis added).

A. Takings Cases Decided in the Real Property Context Apply Equally When Monetary Property is Taken.

"[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 (1985) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 293-297 (1981)). In both *Riverside Bayview* and *Hodel*, the Court ruled that the mere enactment of a statute regulating the use of real property did not, by itself, effect a Fifth Amendment taking. *See Riverside Bayview,* 474 U.S. 121 (permitting scheme to fill wetlands under Clean Water Act Section 404); *Hodel,* 452 U.S. 264 (permitting scheme under the Surface Mining Control and Reclamation Act). Similarly, Congress's enactment of ELIHPA did not effect a taking. Therefore, no Fifth Amendment claim could have accrued just by virtue of that legislative enactment.

The Government argues that cases such as *Riverside Bayview* and *Hodel* are not applicable because they arose in the real property context while a taking of monetary property is at issue here.[3] Brief for United States in Opposition to Petition for Writ of Certiorari, at 17. But why? Any differences between real and monetary property should be irrelevant to examine when a takings claim accrues for statute of limitations purposes. In addressing substantive questions of takings liability the Court applies the same underlying principles whether real or monetary property is at issue. *Concrete Pipe and Prods. v.*

[3] The petitioners argue that this case is a real property matter. *See* Petition for Writ of Certiorari at 28-29. NAHB does not take a position on whether this is a monetary taking or a real property taking, but assert that the Court has never made a distinction.

Construction Laborers Pension Trust, 508 U.S. 602 (1993), is instructive. An employer company withdrew monies from a multiemployer pension trust fund. The Multiemployer Pension Plan Amendments Act (MPPAA) set up a scheme where an employer incurred "withdrawal liability" in such circumstances. *See id.* at 609. Under the MMPA if an employer withdraws funds it must re-pay that amount, with a penalty as calculated under the statute, back into the plan. The "withdrawal liability" is assessed by a notification and demand for payment. *Id.* at 610. Concrete Pipe filed a Fifth Amendment takings claim to challenge an assessment of withdrawal liability charged against it, totaling $190,465.57.

The Court ultimately concluded that Concrete Pipe suffered no Fifth Amendment taking. In reaching that conclusion, Justice Souter's majority opinion applied the rulings of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Hadachek v. Sebastian,* 239 U.S. 394 (1917)—all takings cases decided in the real property context. *See Concrete Pipe,* 508 U.S. at 643-645.[4] When the *Concrete Pipe* Court rejected the employers' claim that the withdrawal liability assessed against it rose to the level of a *Lucas*

[4] The converse is true as well. The Court has cited *Concrete Pipe* as persuasive authority in the context of real property takings. In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court concluded that conditions attached to a land use permit were a taking where they were not "roughly proportional" to the impacts of the proposed development project. In its analysis, the Court remarked that it "approved the principle" in *Concrete Pipe* that " 'a claimant's parcel of property [cannot] first be divided into what was taken and what was left' to demonstrate a compensable taking." *Dolan,* 512 U.S. at 401 (citing *Concrete Pipe,* 508 U.S. at 644).

"total taking," it applied the multi-factor *Penn Central* test to analyze whether compensation for a partial taking was due. *Compare Penn Central,* 438 U.S. at 124-25 (zoning case setting forth the test for a taking as an "ad hoc inquiry" balancing three factors: (1) the character of the government's action, (2) the regulation's economic impact on the property owner, and (3) the extent to which the regulation interfered with the property owner's reasonable investment-backed expectations) *with Concrete Pipe,* 508 U.S. at 644-46 (no taking under *Penn Central*'s framework).

Concrete Pipe is not unique. The Justices typically turn to *Penn Central* and its progeny when analyzing whether the government is liable for a Fifth Amendment taking of monetary property. *See e.g., Eastern Enterprises v. Apfel,* 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in part and dissenting in part) (holdings of land use takings case applied to health fund benefits for retired miners); *Phillips v. Washington Legal Found.,* 524 U.S. 156, 176 (1998) (Souter, J., dissenting) (employing *Penn Central* analysis to interest income from client trust fund accounts). Moreover, when land use agencies appear before the Court to defend themselves against takings liability, they commonly seek application of *Concrete Pipe*'s principles. This term, regulators urged the Court to apply *Concrete Pipe* in a manner that would find no taking under a temporary development moratorium. See Brief for Respondents, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* at 32 (No. 00-1167) (arguing that *Concrete Pipe* governs the Court's approach to the takings "denominator" problem). In prior years, agencies defending against takings claims have cited *Concrete Pipe* to avoid paying compensation from the

application of wetlands regulations,[5] coastal regulations that limited development in endangered species habitat,[6] and to determine whether a takings claim was ripe where the property owner failed to transfer development rights.[7] Finally, lower courts[8] and scholars[9] freely cite the Court's monetary takings cases as persuasive authority in real property takings cases, and vice versa.

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[5] Brief for Respondents at 25, *Palazzolo v. Rhode Island* (No. 99-2047) (citing *Concrete Pipe* to determine if takings inquiry is properly addressed to entire property or portion thereof).

[6] Brief for the Petitioner at 35, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (No. 97-1235) (citing *Concrete Pipe* on issue of distinct investment-backed expectations of pension plan participants).

[7] Brief for Respondent at 33, 34, 40, *Suitum v. Tahoe Regional Planning Agency* (No. 96-243) (quoting *Concrete Pipe* for approach employed in determining economic impact of regulation on property).

[8] *E.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (citing *Concrete Pipe* when discussing "investment-backed expectations"); *District Intown Properties Limited Properties v. District of Columbia,* 198 F.3d 874, 884 (D.C. Cir. 1999) (citing *Concrete Pipe* in an analysis of "reasonable expectations"); *Villas of Lake Jackson, Ltd. V. Leon County*, 906 F.Supp 1509, 1516-17 (N.D. Fl 1995) (citing *Concrete Pipe* when analyzing the land owner's "bundle of rights); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1024 (Md. App. 2000) (citing *Concrete Pipe* in determining whether requiring a developer to set aside recreational space was a taking).

[9] *E.g.*, Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, n. 484 (1997) ("Although *Concrete Pipe* involves the question of whether purely financial interests are subdivisible for purposes of takings analysis, its unequivocal language leaves little doubt that the principle applies to land as well."); James E. Holloway, Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 Dick. J. Env. L. Pol. 421, 453-54 (2001) (citing *Concrete Pipe* in discussion of how smart growth regulations can lead to the taking of a land owner's real property); Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 Ariz. St. L.J. 423 (1995) (citing *Concrete Pipe* in article pertaining to the public trust doctrine and the takings clause).

It is interesting that here the Government would distinguish real property takings from monetary takings for purposes of 28 U.S.C. § 2501 accrual. After all, as an *amicus* the United States routinely relies on *Concrete Pipe* in real property takings cases.[10]

To conclude, this Court, parties arguing before this Court, and the lower courts, all apply the same factors and tests for takings liability whether real or monetary property is at stake. Accordingly, *amicus* NAHB submits that the Court must apply the principles from its real property cases to decide if a takings claim under ELIHPA accrued when Congress passed that statute. As shown below, the answer to that question is "no."

B. The Federal Circuit's Decision Below Cannot be Reconciled with *Palazzolo* or *Williamson County*.

The Federal Circuit's ruling below—that takings claims based on the effect of ELIHPA accrued when that statute was passed in 1988—cannot be reconciled with this Court's opinions in *Williamson County Regional Planning Comm'n v. Hamilton Bank* 473 U.S. 172 (1985), or *Palazzolo v. Rhode Island,* 121 S. Ct. 2448 (2001).

Palazzolo concerned restrictions on land development as the result of the application of state wetlands regulations. Rhode Island's Coastal Resources

[10] See, e.g., Brief for the United States as *Amicus Curiae* Supporting Petitioner in Part at 17, 24, *City of Monterey v. Del Monte Dunes at Monterey, Ltd* (No. 97-1235) (citing *Concrete Pipe* persuasively); Brief for the United States as Amicus Curiae in Support of Respondent, at 17, 18, 19, *Suitum v. Tahoe Regional Planning Agency*, (No. 96-243) (citing *Concrete Pipe* persuasively).

Management Council argued that Mr. Palazzolo was precluded from bringing a Fifth Amendment takings claim because he succeeded to legal ownership of the property *after* the Council issued regulations that limited development in coastal wetlands. In other words, the state argued that someone who acquired property post-enactment "is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo,* 121 S. Ct. at 2462. The Court disagreed with the state's position and found the takings claim "was not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 2464. Under the state's rule, "the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause." *Id.* at 2453. This Court rejected that rule.

The Federal Circuit's ruling below is in tension with *Palazzolo.* Under the Federal Circuit's analysis, if a landowner either owned real property or acquired it more than six years after the enactment of a land use statute, a takings claim would be barred. This, however, would put a six-year "expiration date on the Takings Clause," no matter "how extreme or unreasonable" the government's statute. [11] *Id.* at 2453, 2464.

[11] Furthermore, Fifth Amendment takings cases frequently arise where property owners sue the U.S. Army Corps of Engineers seeking compensation for the Corps' application of regulations to discharge dredged or fill material into navigable waters, promulgated under Section 404 of the Clean Water Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 884 (codified in 33 U.S.C. § 1344). All of these takings cases, based on effects of the Section 404 program, were governed by the same statute of limitations at issue in the case at bench—namely, the six-year statute of limitations governing suits against the federal government brought in the

The decision below also conflicts with *Williamson County*, the Court's seminal ripeness case for takings claims. A takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County,* 473 U.S. at 186. "The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Palazzolo,* 121 S. Ct. at 2458. Here, the ability of an FmHA borrower to prepay (or not) could not be known simply by ELIHPA's enactment in 1988. The statute established a process whereby some borrowers would, in fact, be allowed to pre-pay their loans.[12] No property owner would have a ripe takings claim under *Williamson County* without first resorting to ELIHPA's process to

Court of Federal Claims, 28 U.S.C. § 2501. Under the reasoning of the Federal Circuit's decision below, the following cases would have been time-barred because the impacted property owners initiated litigation more than six years after Congress enacted the Clean Water Act: *Good v. United States.*, 189 F.3d 1355 (Fed Cir. 1999) (takings case brought approximately 25 years after enactment of CWA); *Forest Properties Inc. v. United States,* 177 F.3d 1360 (Fed. Cir. 1999) (takings case brought approximately 25 years after enactment of CWA); *Howard W. Heck and Assoc., Inc. v. United States*, 134 F.3d 1468 (Fed. Cir. 1998) (takings case brought approximately 25 years after enactment of CWA); *Broadwater Farms Joint Venture v. United States*, 121 F.3d 727 (Fed. Cir. 1997) (takings case brought approximately 24 years after enactment of CWA); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (takings case brought approximately 18 years after enactment of CWA); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (takings case brought approximately 13 years after enactment of CWA); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993) (takings case brought approximately 10 years after enactment of CWA).

[12] *See supra* note 2.

receive a final decision on the viability of pre-payment. It was therefore incorrect for the *Federal Circuit* to rule that takings claims started to accrue upon ELIHPA's passage, because no claim could have yet been ripe at that point in time.

The Federal Circuit's decision is illogical in light of *Palazzolo* and *Williamson County.* If it were allowed to stand, the growing number of federal and state courts that rely on *Palazzolo* and *Williamson County* would be forced to make sense of a confusing inconsistency. In a climate where the regulation of land use is the rule, many property owners find themselves in the unfortunate position of bringing takings claims against regulatory agencies. Against that backdrop, this Court must ensure that fundamental takings issues concerning ripeness, post-enactment acquisition, and statute of limitations accrual are all consistent.

CONCLUSION

For these reasons, the National Association of Home Builders urges this Court to reverse the opinion of the Federal Circuit and clarify that a takings claim does not accrue simply upon legislative enactment of a statute.

DATED: February 13, 2002

Respectfully submitted,

Duane Desiderio
Thomas Jon Ward
National Association
of Home Builders